Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR, STATE OF HAWAII, *et al.*,
Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS IDA ALBARARDO, ET AL. ("SMALL OWNERS") IN RESPONSE TO BRIEF FOR THE UNITED STATES AMICUS CURIAE

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The Solicitor General's brief takes certain statements made by the Hawaii Supreme Court in its answers to the questions certified to it by the Ninth Circuit (the "Answers") at face value. The Solicitor General did not have the benefit of the further briefing and oral argument before the Ninth Circuit after the Answers were rendered, and is under the mistaken impression that state proceedings are now pending. The last such action was closed nine years before the Answers.[1]

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[1] The Solicitor General erroneously believes (Brief, p. 11) that the original proceedings were for the purpose of "defining and regulating property rights" in water. They were not, being pro-

Small Owners are owners of lands having appurtenant water rights. Under recognized Hawaiian law, prior to *McBryde*,[2] those water rights included the right to sever or transfer ownership away from the land to which the water was originally appurtenant and the right to divert and use the water on other lands. Almost the entire value of appurtenant water rights inheres in this right of transferability.[3]

Small Owners were joined as defendants in 1959 in a lower court case leading to *McBryde*. In that lower court case, the State of Hawaii never challenged Small Owners' rights to sever their water rights from the land to which originally appurtenant, or to transfer those waters for use on other lands, whether or not within the watershed of origin. Many parties, including the State, claimed and were awarded appurtenant water rights severed from the land to which originally appurtenant. The sole issues before the trial court affecting Small Owners were the determination of what lands had appurtenant water rights by virtue of ancient Hawaiian taro culture thereon and the amount of water to which each such acre was entitled. The original trial court's Amended Judgment

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ceedings, quasi-in-rem, to declare and quiet title to water rights, before a State Circuit Court of general jurisdiction. Such proceedings were pursuant to Part III, Chapter 664, Hawaii Rev. Stat. to adjudicate the ownership "in conformity with vested rights" of all waters of the Hanapepe Valley not previously adjudicated in *Territory v. Gay*, 31 Haw. 376 (1930), *affirmed*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931). Article V of the Hawaii Constitution vests only judicial (not regulatory) power in its courts. The power of those courts with respect to water rights is in no way comparable to a regulatory commission.

[2] *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *rehearing denied*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction, cert. denied*, 417 U.S. 962, 976 (1974).

[3] While taro is primarily grown in deep valley bottoms, sugar and other modern crops are grown on the dry plains above, to which water must be transferred.

of 1969 awarded Small Owners absolute ownership of water rights for a definite quantity of water satisfactory to Small Owners. No appeal was filed by Small Owners. Appeals to the Hawaii Supreme Court were filed by McBryde, Gay & Robinson and the State. No appeal questioned the awards made to Small Owners or the transferability of water or the right of severance and sale of water rights apart from the land involved.

In 1973, the Hawaii Supreme Court held, *inter alia*, that "the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled," thus making such water rights, for the first time, and contrary to more than a century of judicial precedent and private and governmental recognition, nonseparable, nontransferable and useful only on the taro land on which the water was being used when that land first came into allodial ownership during the reign of Kamehameha III. The Supreme Court made no attempt to base this revolutionary decision on any prior State precedent, and relied solely on Hawaii Rev. Stat. § 7-1 (a facially irrelevant statute) and a dictionary definition of the word "appurtenant". App. 4a-5a.

By the *McBryde* court's decision, the Small Owners long-established practice of using water on lands other than lands originally having such water rights was adjudged illegal. Small Owners were thus deprived of the right to sell their water rights to others. Some of the Small Owners own water rights already severed from lands. These owners, by *McBryde*, cannot use them anywhere and are thus, by the judgment, deprived of their entire value.

By proscribing the transferability and severability of all appurtenant waters in the State, the court appropriated for the State, without payment, and without an evi-

dentiary hearing, almost all the waters in the State. This radical and unpredictable change in property rights was made by the Hawaii Supreme Court *sua sponte*, on the basis of a record directed to other issues, a record that included no reference to transferability of water nor any evidence relating to, nor any claim of, nontransferability of such waters, either by the State or any other party. No proceeding permitted Small Owners to defend their rights, or to claim just compensation for the taking of their property.

On first learning of the 1973 decision, Small Owners first opportunity so to do, Small Owners filed a Petition for Rehearing asserting that the court's action constituted a taking of vested rights without compensation and deprived Small Owners of their constitutional right to a hearing. No argument on those constitutional issues was allowed by the Hawaii Supreme Court.

A writ of Certiorari to this court was sought by Small Owners, but was denied. Small Owners then joined in *Robinson v. Ariyoshi*, in the U.S. District Court for Hawaii, the case now before this court on certiorari.

After collecting the evidence relating to the issues raised and decided *sua sponte* in *McBryde*, an evidentiary trial on the merits was held in the District Court, which summarized the facts in its decision and issued an injunction against the State Officials, to prevent the unconstitutional takings of property and denial of due process effected by *McBryde*.

The State Officials appealed. Three oral arguments, each preceded by full briefing, were held before the Ninth Circuit. Between the second and third oral arguments, the Ninth Circuit certified several questions to the Hawaii Supreme Court (as suggested by Chief Justice Richardson's attorney, appearing for the C.J., amicus), which answered the Ninth Circuit (the "Answers"). Special briefs on the effect of those Answers, and covering the

Hawaii Supreme Court's clear attempt to avoid federal jurisdiction while effectively refusing to change *McBryde's* unconstitutional effect on the parties, were filed in the Ninth Circuit, which thereafter heard the final oral argument and affirmed the holdings of the U.S. District Court.

The Solicitor General, without the benefit of all of the foregoing, completely misinterprets the status of *McBryde* and the effect of the Answers.

First—the Solicitor General believes there are "ongoing proceedings in state court" and that the original proceedings were regulatory in nature. Both are incorrect. The last action in *McBryde* was nine years prior to the Hawaii Supreme Court's Answers, and *McBryde* is final and closed. Further, the original proceedings were in the nature of a quiet title action, before a circuit court of general jurisdiction, which had before it as parties all persons owning or claiming water rights in the river.

Second—the Answers were patently designed to try to avoid federal jurisdiction, by creating an illusion of the availability of relief. However, the Answers prove that further (new) proceedings in state court would be useless. According to the Answers, the private parties cannot challenge *McBryde* in a new state court action. Answers, 658 P.2d at 303-04. The Answers assert that the state courts in any further state court proceedings must follow *McBryde* absolutely, including all its *dicta*, without reexamining its constitutionality. *Id.* at 298-99, 303-04.

As a demonstration of the lengths to which the Hawaii Supreme Court went to avoid federal jurisdiction note its Answer to Certified Question 6, which says, *inter alia*, that there may never be such a thing as "settled" law in matters of water rights and, most incredibly, that case authorities from Hawaii's territorial history between 1897

and 1959 are inherently unreliable and, therefore, could not constitute settled law; and that the failure of court cases to exactly quantify surplus water, meant that surplus water was not susceptible to private ownership![4]

The Hawaii court's tarnish on territorial case authorities is outrageous. Chief Justice Richardson states:

> The only cases treating 'surplus water' as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it [*sic*], we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was sovereign its authority to frame the law was unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal interest. And it is from our authority as a *state* that our present common law springs. . . .

Answers, 658 P.2d at 306 n.25. The rejection of territorial cases because of their "federal taint" is unprecedented. Since statehood and even since the Answers, decisions by the Hawaii Supreme Court have consistently relied upon and built upon the court decisions rendered during territorial days. While federal courts will normally not review a state court's interpretation of state law, it will when it appears to be clearly untenable or amounts to an obvious subterfuge to avoid federal review

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[4] By that answer the court sought to support *McBryde's* transfer of all surplus water to the State. If there were, or could be, no "vested rights" in water, the long-standing statute requiring the circuit court to adjudicate water rights "in accordance with vested rights" was also unneeded.

of a deprivation by the state of rights guaranteed by the federal constitution.[5]

Third—In the *Reppun* case,[6] decided on the basis of *McBryde*, and rendered just nine days before the issuance of the Answers, the Hawaii Supreme Court conceded that *McBryde* overruled more than a century of settled waterlaw. *Reppun* referred to the federal district court's judgment in this case as follows: "*McBryde* has been criticized as an unjustifiable deviation from preexisting water law." 656 P.2d at 63. In response to the Honolulu Board of Water Supply's assertion in *Reppun* that "*McBryde* is an aberration that must be overruled," *id.* at 60, the Hawaii Supreme Court responded: "We have re-examined our decision and are still convinced it represents a correct statement of the law governing water rights in Hawaii."

Reppun adopted and further amplified the harshness of the *McBryde* reversal of prior Hawaiian law by holding that the Honolulu Board of Water Supply had received nothing from its purchases and condemnations over many years of private surplus water rights and water rights severed from the lands to which the rights were originally appurtenant. The court decreed that, immediately upon a purported transfer of appurtenant water rights, the rights were thereupon forfeited and became null and void and thus inured to the benefit of the State, as owner of all surplus waters pursuant to *McBryde*.

Without the decision of the U.S. District Court, affirmed by the Ninth Circuit below, the Small Owners' title to their water rights is far more than merely

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[5] *Ward v. Love County*, 253 U.S. 17, 22-23 (1920); *Terre Haute & I.R.R. Co. v. Indiana*, 194 U.S. 579, 589 (1904).

[6] *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982), *cert. denied sub nom. Honolulu Bd. of Water Supply v. Nakata*, —— U.S. ——, 105 S. Ct. 2016 (1985).

"clouded," such rights would no longer be salable or leasable because of *McBryde*, and, if already severed, would be lost entirely, a result confirmed by the holding in *Reppun* that any purported transfer causes the total destruction of such water rights (and a reversion of them to the State, as owner). While the Answers attempted to mislead the Ninth Circuit, the Hawaii Supreme Court's intransigence in adhering to *McBryde* in its full harshness is revealed by *Reppun*. *Reppun's* holding that appurtenant rights are extinguished if an owner tries to transfer or reserve them (656 P.2d at 71) was adopted in the Answers. Absent the Ninth Circuit's decision, confiscation of the severed appurtenant water rights of the Small Owners, and deprivation of almost all the rest of their value would result.[7]

This court should not be misled by the Answers as the Solicitor General unfortunately has. *Reppun* shows the true intent of the Hawaii Supreme Court. The Ninth Circuit had the benefit of full briefing, three oral arguments, and the entire record. It was not misled, and its ruling should be allowed to stand.

Fourth—It should be noted by this court that the "appearance of impropriety" permeates the Answers.

In the present case, Chief Justice Richardson filed amicus briefs and other memoranda with the Ninth Circuit Court in support of the position of the State Officials. In his amicus briefs, Richardson vigorously argued the merits of the *McBryde* decision and advocated positions on many of the same issues later posed by the certified questions. Such advocacy does not differ in kind from

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[7] Under existing Hawaii law there can be no monetary inverse condemnation award. *City & County v. Allen*, 58 Haw. 432 (1977). *Allen* held that monetary relief for a governmental regulatory taking of vested rights is not available, and that the "proper remedy" is to equitably estop the government from its new regulation, and allow the victim to continue as if no such change had occurred.

participation as a party. *Hampton v. Hanrahan*, 499 F. Supp. 640, 645 (N.D. Ill. 1980).

Yet, Richardson twice refused motions for recusal from the proceedings on the Certified Questions and in fact authored the Answers.

Richardson's appearance of partiality was enhanced by having Williamson Chang as his counsel of record. Chang was a special deputy attorney general of the State of Hawaii with authority to, and who did represent the State and the State Officials in this case, filing a brief on the State Officials behalf in the Ninth Circuit. Richardson's attorney's appearance and advocacy on behalf of the State officials as well as the Chief Justice as "Amicus" makes clear that Richardson was "so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before 'an unbiased judge' is essential to due process." [8]

An integral part of due process is the opportunity to be heard before an unbiased court. This court has said that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *In re Murchison*, 349 U.S. 133, 136 (1955). And *see, Aetna Life Ins. Co. v. Lavoie*, —— U.S. ——, No. 84-1601 (April 22, 1986).

That Chief Justice Richardson could:

(a) participate as an "amicus" before the Ninth Circuit,

(b) use the same attorney as represented the State Officials,

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[8] *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971). *See Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965) (judge disqualified when represented in the same case by attorneys for one of the parties); *Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976) (judge disqualified where law firm representing the plaintiffs previously had acted on behalf of the judge).

(c) have his attorney invite the Ninth Circuit to propound certified questions to his own court,

(d) write answers to those questions (after twice denying recusal motions) in a fashion such as to seek to evade federal jurisdiction, while still resolutely maintaining that the so-called "dicta" of *McBryde* would still bind its victims, thus preventing any meaningful rights in those whose water rights were taken by *McBryde*, and

(e) write the Answers in a fashion contradictory to positions on the same issues taken in *Reppun* only nine days earlier—is more than should be allowed.

To quote Justice Stewart in *Hughes v. Washington*, 389 U.S. 290, 296-7 (1967): ". . . a State can not be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactivity that the property it has taken never existed at all." And, even more surely is this so when the State's opinions are written by a justice clearly violating accepted precepts against impropriety or the appearance of impropriety.

For all the reasons stated, the Small Owners pray that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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